85-412

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO._____

VICTOR WRIGHT,
PETITIONER,

v.

UNITED STATES of AMERICA, UNITED STATES DEPARTMENT of JUSTICE, ATTORNEY GENERAL of the UNITED STATES, UNITED STATES ATTORNEY for the SOUTHERN DISTRICT of FLORIDA, and FIRST ASSISTANT UNITED STATES ATTORNEY for the SOUTHERN DISTRICT of FLORIDA,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STSTES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

I. To what extent is discrimination based on age permissible in a federal personnel action affecting an applicant for employment who is over 40 years old?

II. Must the alleged legitimate, nondiscriminatory reasons for refusing to hire a job applicant be introduced into evidence by the employer in order to constitute a defense to an action based on age discrimination, or is it sufficient to assert them in the defendant's proposed conclusions of law?

III. Does a non-job related barrier to consideration for federal employment constitute an impermissible adverse impact on a member of the protected class?

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CITATIONS TO OPINIONS BELOW

The opinions of the court of appeals and of the district court are not reported. Both are set out in full in the appendix hereto.

JURISDICTION OF THIS COURT

(i) The judgment of the court of appeals sought to be reviewed was entered July 24, 1985.

(ii) A petition for rehearing was filed by petitioner on July 31, 1985, and an order denying the petition for rehearing was entered on August 13, 1985.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 U.S.C. section 1254(1).

STATUTE INVOLVED

This case involves that section of the Age Discrimination in Employment Act (ADEA) applicable to federal personnel actions, viz.: Title 29 U.S.C. section 633a. The relevant subsections thereof are:

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

* * *

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

* * *

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section

> 631(b) of this title and the provisions of this section.

Title 29 U.S.C. section 631(b) provides:

> (b) Employees or applicants for employment in Federal Government.
>
> In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

This is an age discrimination action brought by a federal job applicant under the separate provision of the Age Discrimination in Employment Act (ADEA) applicable to federal personnel actions, viz.: Title 29 U.S.C. section 633a. Jurisdiction of the United States District Court for the Eastern District of Pennsylvania was founded upon Title 29 U.S.C.

section 633a(c) and Title 28 U.S.C. section 1331. Venue was laid under Title 28 U.S.C. section 1391(e)(4). Commenced as a class action, after certification of a class was denied by the district court it proceeded as an action by petitioner (the named plaintiff) only.

A nonjury trial was had following which the district court made findings of fact and conclusions of law and wrote a Memorandum Opinion, which, together with judgment in favor of respondents (defendants below) and against petitioner, was entered on October 2, 1984. Notice of appeal to the United States Court of Appeals for the Third Circuit, pursuant to Title 28 U.S.C. section 1291, was filed by petitioner on October 17, 1984.

In 1981, in response to public announcements by the Office of the U.S. Attorney for the Southern District of Florida that it was seeking applicants

for positions as Assistant U.S. Attorneys, petitioner, then 58 years of age, submitted his application. Among his qualifications set forth in the application were that he had been graduated from Yale University with High Honors; that he had been graduated from the Stetson University College of Law, DeLand, Florida, magna cum laude; that he had been a Sterling Graduate Fellow at the Yale Law School; that he was a member of the Bars of Florida (since 1951), Pennsylvania (since 1954), and Vermont; that he had been an Assistant District Attorney in Philadelphia, a Deputy Attorney General of Pennsylvania, and an Assistant U.S. Attorney in the Eastern District of Pennsylvania; and that he had nearly twenty years of litigation experience in state and federal trial and appellate courts.

On the recommendation of the hiring committee of the U.S. Attorney's

office, an interview of petitioner was arranged by the then First Assistant U.S. Attorney for the Southern District of Florida, Brian McDonald, but before it could be held it was postponed due to the impending appointment of a new U.S. Attorney, Stanley Marcus.

Having heard nothing in the ensuing two months petitioner telephoned McDonald who stated that Marcus (who meanwhile had been appointed and confirmed as U.S. Attorney) was reviewing the personnel needs of the office and that petitioner's application was still active. When petitioner attempted to telephone McDonald again a month later he learned that the latter had left the Southern District of Florida and had been replaced by Jay Brant as Executive (or First) Assistant U.S. Attorney.

Unsuccessful in several attempts to reach Brant by telephone, petitioner

wrote to him on June 30, 1982, inquiring as to the status of his application. On July 20 Brant and petitioner had a telephone conversation in which Brant told petitioner that he would have an answer for him in two to four weeks. Then, on August 20 petitioner telephoned Brant again. Brant, who testified that he had decided in June not to interview petitioner, did not tell petitioner of that decision. Instead, Brant said that they had recently hired a number of persons with extensive state and federal prosecution experience and that there were no further openings at that time.

In answers on behalf of all the respondents to interrogatories, Brant stated that the reason for the decision not to hire petitioner was that "[t]he applicants interviewed and those ultimately hired ... are better qualified than plaintiff ..." but that the "dispos-

ition or decision on plaintiff's application ... is to hold it in abeyance". (Marcus, however, testified that he was unaware that any application had ever been "held in abeyance.") At his deposition, which was read in part into the record, Brant testified that "from everything I saw in his file" petitioner's experience was civil and they were not hiring for the Civil Division. Finally, at trial Brant added that petitioner did not list the dates of his employment in his initial letter of inquiry. He thus gave four different reasons for not hiring or even interviewing petitioner on the three different occasions he was asked.

Between October 15, 1981, the date of petitioner's application, and the end of December 1983, the U.S. Attorney's office hired 46 Assistant U.S. Attorneys for non-supervisory positions, of whom 43, or 93 percent, were under 40 years of

age.

Brant testified at his deposition, which was read in part into evidence, that applicants for Assistant U.S. Attorney positions were divided into two groups: (1) those applicants "who are fairly recent graduates of law school, perhaps two, three years out of law school" and (2) "more experienced people". "That philosophy is premised on the idea that the office will be stronger if you have a cross section of people, if you train some of your own and if you bring some people in who are experienced to begin with.... [petitioner] would clearly be considered along with the more experienced part of the applicant pool."

Marcus testified at his deposition, which was likewise read in part into evidence, that "[petitioner] would have been competing against a pool of experienced lawyers. We were hiring experienc-

ed lawyers as well as more junior lawyers coming off clerkships and a few years with a large law firm."

There is no job description for the position of Assistant U.S. Attorney, and consequently there are no separate or different job descriptions for persons who are "fairly recent graduates of law school, perhaps two, three years out of law school" and "more experienced lawyers".

Brant identified nine individuals who were hired in the category of "fairly recent graduates of law school". Brant testified that of the nine - whose ages ranged from 25 to 36 years and averaged 29.7 years - only two had any trial experience at all.

In addition to those nine individuals, there were six others who had been graduated from law school up to three years (and as little as seven

months) before being employed as Assistant U.S. Attorneys.

Petitioner's expert statistician made two distinct analyses of applicant age data contained in personnel materials produced by respondents. First, he analyzed the data to determine the relative rates of eligibility of persons under and over age 40 for consideration as "fairly recent graduates of law school" with three years or less experience (referred to in the testimony as "set aside jobs"). He testified:

> A The first analysis that I performed ... was to consider people who were eligible for the set-aside jobs, jobs for which one had been a recent law school graduate with less than three years experience and considered people who were eligible or not eligible for those jobs by age groups. Table 1 of my report ... shows calculations of this eligibility analysis. The first thing that I found was that only three of 22 individuals over the age of 40 were eligible for those set-aside positions. That's an eligibility rate of about 13.6 per-

> cent... This compares with applicants who were under the age of 40. 171 of 272 of these younger applicants were eligible with an eligibility rate of about 63.1 percent compared with the 13.6 percent for older workers. ...the probability of observing this particular distribution, that is, with older applicants being much less likely to be eligible than younger applicants ...by chance would occur only 17 times in one million, an extremely small probability.

The expert's second analysis concerned hiring decisions, not eligibility, and therefore has no bearing on the disparate impact aspect of the case. It was this second analysis that produced no statistically significant data.

Marcus "solicited a variety of people for senior positions really from Florida and throughout the country." He stated that he "believed", or "thought", or his "best guess" was that several of these individuals were over 40 years of age, or "about 40, something in that range." Marcus gave no basis for his

estimates or guesses as to the ages of the individuals he contacted. However, "[t]hese folks were not applicants. These folks were solicited by me [Marcus]", and, in any event, all but one of those whom he named were under consideration for the position of Chief Assistant U.S. Attorney or some other supervisory position - positions for which petitioner had not applied.

It is undisputed that petitioner made out a prima facie case of disparate treatment, and the district court so found. The court also found that the respondents had articulated legitimate, nondiscriminatory reasons for failure to hire petitioner; and that petitioner's statistical evidence, offered in support of the disparate impact aspect of the case, was deficient in that it did not take into account the solicitations Marcus made of persons he tried to re-

cruit for the position of Chief Assistant U.S. Attorney and for other supervisory positions - positions for which petitioner had not applied.

REASONS FOR ALLOWING THE WRIT

I. The court of appeals decided the question of the degree of age discrimination allowable in a federal personnel action in a way contrary to applicable decisions of this Court.

Unlike the Age Discrimination in Employment Act (ADEA) applicable to non-federal employees and job applicants, Title 29 U.S.C. section 621 et seq., which provides that "[i]t shall be unlawful for an employer ... to discriminate against any individual ... <u>because</u> <u>of</u> ... age...", the age discrimination law applicable to the federal sector, Title 29 U.S.C. section 633a, states that "[a]ll personnel

actions affecting employees or applicants for employment ... shall be made free from any discrimination based on age." [Emphasis added.]

In Lehman v. Nakshian, 453 U.S. 156, 166 (1981), this Court held:

> Congress expanded the scope of ADEA in 1974 to include state, local, and Federal Government employers. State and local governments were added as potential defendants by a simple expansion of the term "employer" in the ADEA. The existing ... provisions of the Act ... were thereby extended to cover state and local government employees. In contrast, Congress added an entirely new section ... to address the problems of age discrimination in federal employment. Here Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector...[Emphasis added.]

This Court pointed out that the original Senate bill would have simply amended the definition of "employer" to include the federal government as it did in the instance of state and local gov-

ernments. However, a revised version of the bill that contained the present language was substituted and enacted into law. 453 U.S. at 166, note 14.

If Congress had intended to apply the same standard to the federal government as it had established for the private sector and for state and local governments, it could have simply enacted the original bill. In that case the "because of" language of the ADEA would have applied equally to federal as to all other covered employers. Instead, it imposed upon federal agencies the highest possible standard of positive conduct - "free from any discrimination". This Court noted in Nakshian, 453 U.S. at 166-167, that Title 29 U.S.C. section 633a is modeled after the section of Title VII that imposes upon the federal government the obligation to make personnel decisions"free from any discrimination

based on race ..." Title 42 U.S.C. section 2000e-16. In connection with that legislation, Senate Report No. 92-415, set forth at 118 Cong. Rec. 4937 (1972), quotes with approval the statement of the President that "discrimination of any kind not relevant to job performance must be eradicated completely from Federal employment." [Emphasis added.] The Senate floor manager of the bill stated, id. at 4940, that "I cannot emphasize the concern that was expressed in our committee over the need to have the Federal Government as the model employer." [Emphasis added.] This "need to have the Federal Government as the model employer" evidently led the Congress to impose upon federal agencies the "free from any discrimination" standard rather than one which admits of some discrimination so long as it is not, e.g., "a determinative factor", which the court of appeals held

in the case at bar to be at once (1) the minimum amount necessary to prove liability and (2) lawfully acceptable. Memorandum Opinion at 56, infra.

Personnel actions taken by federal executive departments and agencies are specifically mandated by subsection (f)* to be not subject to, or affected by, any provision of the ADEA other than those of section 633a. That is, personnel actions such as the rejection by the respondents of petitioner's application are subject to the "free from any discrimination" internal standard of section 633a and not to the "because of" standard of the nonfederal ADEA; not to "a determinative factor" yardstick of the court of appeals which was fashioned for use in

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* The restrictive provision of subsection (f) must be contrasted with the expansive one of subsection (c), which affords such relief as will effectuate the purposes of the entire chapter.

nonfederal ADEA cases; and not to the "but for" criterion imposed by the district court in its Conclusion of Law No. 8 which it adopted verbatim from Defendants' Proposed Conclusion of Law No. 9. See pages 71 and 82, respectively, infra. Patently the division of applicants into two groups according to age and experience - as admittedly practiced by respondents - is discriminatory and therefore prohibited.

Neither court below made reference to the Nakshian case, although it was cited to both. Nor did the court of appeals refer to two cases decided by this Court after petitioner's brief in that court was filed but which were cited by petitioner during oral argument. In Johnson v. Mayor and City Council of Baltimore, ___U.S.___, 105 S.Ct. 2717 (1985), the Court said, id. at 2719 n. 1:

> Federal employees are covered in a separate section of the [Age Discrimination in Employment] Act and are treated differently from nonfederal employees in various ways ... [Emphasis added.]
>
> * * *
>
> While Congress at first exempted federal employees from the reach of the Act, it now applies even more protective rules to older federal employees than it imposes on other employers. Id. at 2724, note 10. [Emphasis added.]

The other recent decision of this Court which bears on the issue is Western Air Lines, Inc., v. Criswell, ___U.S.___, 105 S.Ct. 2743 (1985), where the Court held, id. at 2755, that the applicable statutory standard should be applied instead of one from some other source. Thus, in the case at bar the statutory phrase "free from any discrimination" should be the standard rather than one judicially formulated to apply to other sections of the ADEA, especially in light of section 633a (f) which provides that

"personnel actions" shall not be "subject to or affected by any other provision of this chapter." A like prohibition should apply to judicial interpretations of other provisions of the chapter so far as they affect personnel actions and not relief.

The court of appeals held, Memorandum Opinion at 56, infra, that petitioner was not "aggrieved" within the meaning of section 633a(c) which provides that "[a]ny person aggrieved may bring a civil action," since he had not shown that age was "a determinative factor" in respondents' refusal to hire him. It is submitted that any practice by a federal agency whereby older applicants are only 21.6 percent as likely to be eligible for employment as younger ones is patently not "free from any discrimination based on age." See discussion under III, infra. Petitioner has accordingly shown that he

was "aggrieved".

II. The court of appeals decided the question, whether respondents had articulated legitimate, nondiscriminatory reasons for refusing to hire petitioner, contrary to a decision of this Court.

Petitioner having proved a prima facie case of disparate treatment, the burden shifted to respondents to articulate a legitimate, nondiscriminatory reason for petitioner's rejection. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In its Conclusion of Law No. 5, the district court listed seven of the eight reasons advanced by respondents for refusing to hire petitioner (District Court Memorandum at 69, infra):

> 5. Defendants have articulated legitimate, non-discriminatory reasons for failure to hire

plaintiff, including:

(a) the timing of his application and interview precluded his hire under the previous United States Attorney (Wampler) before April, 1982;

(b) after April, 1982, his application was, according to the records available to defendants, incomplete and inadequate;

(c) he was unknown to the United States Attorney (Marcus) from prior personal experience, or personal recommendations;

(d) he had no present connection with the Southern District of Florida or its courts or legal community;

(e) he had no specialized expertise in narcotics and dangerous drug prosecution;

(f) he had no previous work experience with the Judges and the courts in the Southern District of Florida:

(g) defendant [sic] was one of over 200 applicants competing for approximately 40 jobs at the office of United States Attorney, and his application failed to distinguish him as someone worthy of special consideration.

The foregoing conclusion of law was adopted verbatim - even to the typographical error in (g) of referring to petitioner as "defendant" - by the district court from Defendants' Proposed

Conclusion of Law No. 5, except that the court omitted the suggestion of defense counsel that "his [petitioner's] experience in the field of criminal law was not current." P. 80, infra.

A proposed conclusion of law is, of course, a mere contention, suggestion, or argument of counsel urging his view upon the court; it clearly is not evidence.

In Texas Department of Community Affairs v. Burdine, supra, this Court held, 450 U.S. at 255:

> ...the defendants must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. [Emphasis added.]

In a footnote to this holding, the Court explained, id., note 9:

> An articulation not admitted into evidence will not suffice. Thus the defendant cannot meet its burden merely ... by argument of counsel. [Emphasis added.]

The court of appeals held that "[petitioner] makes a persuasive argument that at least some of the reasons enumerated were unsupported in the record." Memorandum Opinion at 53, infra. (These "reasons" - (a), (b), (d), (e), and (f), supra - will accordingly not be discussed here.) The court of appeals then approved the district court's Conclusion of Law No. 5(c) as a "legitimate, non-discriminatory reason articulated by defendants for the failure to hire [petitioner] that 'he was unknown to the United States Attorney (Marcus) from prior personal experience, or personal recommendations.'" The court of appeals found this conclusion to be justified because of the further finding of the district court that "[m]ost persons hired ... were as a result of personal recommendations or personal knowledge by Mr. Marcus." This latter finding is as wholly devoid of evi-

dentiary support as are the purportedly legitimate, nondiscriminatory reasons offered by respondents.

Marcus was examined closely by his counsel concerning his reasons for hiring certain persons. These were 14 of the 52 individuals hired as Assistant U.S. Attorneys (including supervisory positions) between October 15, 1981 (the date of petitioner's application), and the end of 1983. For each of the 14 he stated that among the reasons was either that he knew the individual personally or that someone in whom he had confidence had recommended the person to him. In addition, it is undisputed that Marcus personally knew the person who was hired as Chief of the Civil Division. Thus the record shows only that 15 of the 52 hired were selected at least in part for the reason stated. This is hardly, by any definition of the word, "most" of the 52.

Moreover, it is undisputed that Marcus did not know of petitioner or that he had applied for a job until after this action was commenced in 1983. Therefore, Marcus's lack of knowledge of petitioner could not have been known to Brant in 1982, and he was the only person to whom Marcus had delegated the duty of screening applicants. This alleged reason is as much a fabrication as the others as is further demonstrated by the fact that there was a like want of familiarity with 37 of the 52 who were hired.

The court of appeals also was unpersuaded that the district court erred in its Conclusion of Law No. 5 (g) that petitioner "was one of over 200 applicants competing for approximately 40 jobs at the office of United States Attorney, and his application failed to distinguish him as someone worthy of special consideration". Brant was the only witness who

could have and in fact did give evidence as to the alleged reasons for not hiring petitioner. At various times as conditions seemed to him to require he gave various reasons, viz.:

> (a) In answers to interrogatories read into the record, Brant swore that -
>
> > (i) the applicants hired were better qualified than petitioner; and
> >
> > (ii) petitioner's application had not been rejected but was being held in abeyance;
>
> (b) At his deposition, he testified that "from everything I saw in his file" petitioner's experience was civil and they were not hiring for the Civil Division;
>
> (c) At trial, he repeated the statement in (b) and added that petitioner did not list the dates of his employment at the time of his initial inquiry.

On whether Brant can be believed in view of the internal conflicts in his story, see Anderson v. City of Bessemer City, ___U.S.___, 105 S.Ct. 1504, 1512-13

(1985). But credibility aside, these are the only reasons that appear by way of evidence for not hiring petitioner. There is no evidence that petitioner's "application failed to distinguish him as someone worthy of special consideration." If that had in fact been a reason it could have been easily elicited from Brant. However, the sole source of this alleged reason was, as it was for the others, the imagination of the draftsman of Defendants' Proposed Conclusions of Law and not evidence of record in the case.

The alleged legitimate, non-discriminatory reasons for refusing to hire petitioner having been presented to the trial court merely by argument of counsel and not by way of evidence, they do not constitute a defense and judgment should have been entered for petitioner.

III. The court of appeals decided the question, whether a non-job related barrier to consideration for employment constitutes an impermissible adverse impact on a member of the protected class, contrary to decisions of this Court.

Brant, one of only two witnesses for respondents, testified at his deposition, which was read in part into evidence, that applicants for Assistant U.S. Attorney positions were divided into two groups, viz.: (1) those applicants "who are fairly recent graduates of law school, perhaps two, three years out of law school" and (2) "more experienced people". "That philosophy is premised on the idea that the office will be stronger if you have a cross section of people, if you train some of your own and if you bring some people in who are experienced to begin with.... [petitioner] would clearly be considered along with the more experienced part of the applicant pool."

Marcus, the other defense wit-

ness, testified at his deposition, which was likewise read in part into evidence, that "[petitioner] would have been competing against a pool of experienced lawyers. We were hiring experienced lawyers as well as more junior lawyers coming off clerkships and a few years with a large law firm."

In the brief for respondents in the court of appeals, the following appears:

> Brant testified that "we don't make any precise allocation" between "recent graduates we could train ourselves" and "experienced people", rather, the office tried to obtain the cream of <u>both pools</u>. [Emphasis added.]

Thus, there clearly were two pools or groups of applicants.

In its Memorandum Opinion, the court of appeals said, p. 52, infra:

> The district court did not credit the statistical evidence offered by [petitioner's] expert which

> did not include all offerings of employment made by the United States Attorney's Office.* Instead, the expert limited his study to those applicants who had submitted written applications for employment.

The "offerings of employment" were Marcus's "solicit[ations] of a variety of people for senior positions" - positions for which petitioner had not applied and which were not included in the only analysis made by the expert that bears on the case. Marcus testified:

> Q. Did you consider any of these people to be applicants for the position of Assistant U.S. Attorney in an administrative position or otherwise?

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* The district court was confused as to the purpose of the statistical evidence. It said, District Court Memorandum, at 60, infra, that "[t]he plaintiff offered testimony as to disparate treatment, however, the evidence is defective as it did not include all offerings of employment made by the United States Attorney's Office, but merely reviewed the results of those persons who submitted written applications for employment." [Emphasis added.] Of course, the statistical evidence was introduced solely in relation to the disparate impact aspect of the case.

> A. These folks were not applicants. These folks were solicited by me. These folks were people I converted into applicants by attempting to convince them that they ought to be interested in employment... [Emphasis added.]

Since according to Marcus "these folks" were not applicants, they do not belong in a statistical analysis of applicants. Moreover, (a) Marcus admittedly was "consider[ing] many of them for the same spot, as I was looking to fill the same slot of Chief Assistant" as well as recruiting for other supervisory jobs - jobs for which petitioner had not applied; (b) the applicant data which the expert used for his first analysis (see below) excluded all applicants for supervisory jobs; and (c) significantly, the federal section of the ADEA, Title 29 U.S.C. section 633a, under which this action was brought, is applicable only to "employees or applicants for employment"

- not to individuals who are sought out and asked to accept positions. Such persons scarcely need the protection of an Act of Congress.

Next, the court of appeals held, Memorandum Opinion at 52, infra:

> Further, [petitioner's] statistical case depends upon the underlying assumption that there was a fixed set-aside program of a specific number of recent graduates. The evidence did not compel the district court to find there was such a fixed division between the new hirees.

Both the district court and the court of appeals failed to consider and to apply Connecticut v. Teal, 457 U.S. 440 (1982).

The expert testified in pertinent part:

> A The first analysis that I performed ... was to consider people who were eligible for the set-aside jobs, jobs for which one had been a recent law school graduate with less than three years experience and considered

> people who were eligible or not eligible for those jobs by age groups. Table 1 of my report ... shows calculations of this eligibility analysis. The first thing that I found was that only three of 22 individuals over the age of 40 were eligible for those set-aside positions. That's an eligibility rate of about 13.6 percent... This compares with applicants who were under the age of 40. 171 of 272 of these younger applicants were eligible with an eligibility rate of about 63.1 percent compared with the 13.6 percent for older workers....the probability of observing this particular distribution, that is, with older applicants being much less likely to be eligible than younger applicants ...by chance would occur only 17 times in one million, an extremely small probability. [Emphasis added.]

Thus, the expert's first analysis was concerned with eligibility even to be considered for certain jobs irrespective of numbers reserved or actually hired. For this first analysis, moreover, he used only data for applicants for the non-supervisory positions that were being filled. He then explained that his second

analysis "concerned hiring decisions" not eligibility. It was this second analysis - not the first - that produced no statistically significant data. Contrary to the holdings of both lower courts it has no bearing on the disparate impact case.

Connecticut v. Teal, supra, makes it clear that in a disparate impact case the sole consideration is any barrier to employment opportunity, not actual hires (or promotions). Accord, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). See also Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In Teal, 26 of 48 (54.17 percent) black candidates passed a promotion examination, while 206 of 259 (79.5 percent) whites received passing scores. A total of 46 persons were promoted as a result of the examination, 11 black and 35 white. Thus, of the 48 black applicants 22.9 percent were promoted while only 13.5 percent of the 259 white ap-

plicants received promotions. Connecticut contended that since the "bottom line" showed a more favorable promotion rate for blacks than for whites there was no Title VII violation. This Court disagreed, 457 U.S. at 442:

> Under [the "bottom line"] theory ... an employer's acts of racial discrimination in promotions - effected by an examination having disparate impact - would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case. [Emphasis added.]

In the case at bar repondents argued in both courts below that, since 43 of the total 272 applicants under age 40 were hired for a hire rate of 15.8 percent, and since four of 22 applicants above the age of 40 were hired for a rate

of 18.2 percent, the "bottom line" was that the over-40 applicants fared better than the younger ones. This is precisely the argument that this Court rejected in the Teal case!

In Teal, the eligibility rate for blacks who passed the examination was 68.1 percent that of whites. In the case at bar, the eligibility rate of applicants over age 40 was only 21.6 percent of the eligibility rate of those under 40 - far below the rate held to show disparate impact in Teal and far below the 80 percent figure "generally ... regarded ... as evidence of adverse impact." 457 U.S. at 443, note 4.

The section under which this action was brought provides that "[a]ll personnel actions affecting ... applicants for employment ... in executive agencies ... shall be made free from any discrimination based on age." Title 29

U.S.C. section 633a. Surely a policy which results in an eligibility rate for applicants over age 40 of only 21.6 percent of the eligibility rate of those under 40 "affects" members of the older, protected group "based on age" and is at least as effective a barrier to opportunity as that employed in Teal. Specifically, petitioner was "affected" by the barrier of his not being eligible for whatever number of jobs there might have been for recent graduates. As the record shows, the actual number was nine commencing with Marcus's tenure - nine jobs for which petitioner was ineligible even to be considered based on age.

Reference again to the testimony of the expert as to his first analysis - upon which the statistical part of the case is exclusively based - shows that the disparate impact aspect of this case is not concerned with numbers or percent-

ages hired but with those eligible. Accordingly, the assertion by the court of appeals that "[petitioner's] statistical case depends upon the underlying assumption that there was a fixed set-aside program of a specific number of recent graduates ...", Memorandum Opinion at 52, infra, shows a complete disregard of the teaching by this Court in disparate impact cases such as Connecticut v. Teal, supra; Albemarle Paper Co. v. Moody, supra; and Griggs v. Duke Power Co., supra. Although the latter are cases that arose under Title VII, they are rendered applicable to section 633a cases by reason of the fact that section 633a was patterned directly after the federal section of Title VII. Lehman v. Nakshian, supra; see discussion under I, supra.

The court of appeals also held, Memorandum Opinion at 52-53, infra:

> Since the expert conceded that there would not be a statistically significant difference if the categories posited by [petitioner] did not exist, we cannot find that the district court erred in concluding that the disparate impact theory had not been proven.

Obviously, if applicants had not been divided into two pools or groups - despite the testimony and the statement in respondents' brief that there were two pools - there would be no statitistical difference! If there had been no black or no white candidates for promotion in Connecticut v. Teal, supra, or if in the many other cases in which discrimination between categories of applicants or employees because of race, sex, or age, there had been no separate groups, pools, or categories of persons, there would not be a disparate impact theory of employment discrimination nor need for one. But separate categories have existed and do exist, and they existed in this case.

CONCLUSION

For the foregoing reasons, or any of them, the writ of certiorari should be allowed.

Respectfully submitted,

Victor Wright
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Petitioner, pro se

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 84-1630

VICTOR WRIGHT, individually and on behalf of all others similarly situated,

Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM FRENCH SMITH, individually and as Attorney General of the United States of America; ATLEE W. WAMPLER, III, individually and as former U.S. Attorney for the Southern District of Florida; G. Brian McDONALD, individually and as former First Assistant U.S. Attorney for the Southern District of Florida; STANLEY MARCUS, U.S. Attorney for the Southern District of Florida; and JAY BRANT, First Assistant U.S. Attorney for the Southern District of Florida

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Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 83-0797)
District Judge: James McGirr Kelly

Argued July 18, 1985

Before: SEITZ and SLOVITER, Circuit Judges, and COHEN, District Judge*

Opinion Filed July 24, 1985

MEMORANDUM OPINION OF THE COURT

SLOVITER, Circuit Judge.

Appellant Victor Wright appeals from the judgment of the district court, sitting without a jury, in favor of the defendants United States and officials thereof in appellant's suit alleging that he was not hired as an Assistant United States Attorney for the Southern District of Florida because of his age in violation of 29 U.S.C. section 633a(a).

Our standard of review is whether the district court's findings of fact were clearly erroneous. See Anderson v. City of Bessemer City, North Carolina, 105 S.Ct. 1504, 1511 (1985). The district

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* Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

court found, and the defendants admitted, that Wright had made out a prima facie case. The court also found that Wright had not proven his claims of disparate impact and disparate treatment and that defendants' failure to hire Wright was not the result of purposeful or intentional discrimination. After consideration of all contentions raised by appellant and the record, we cannot conclude these findings are clearly erroneous.

We turn first to the disparate impact theory, which this court has assumed without deciding does apply to age discrimination suits. Massarsky v. General Motors, Inc., 706 F.2d 111, 120 (3d Cir.), cert. denied, 104 S.Ct. 348 (1983). Cf. EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) (holding disparate-impact analysis could be applied in age discrimination actions). The dis-

trict court here concluded that there was "no valid statistical evidence which shows that the hiring program of the United States Attorney's Office had an adverse impact on the plaintiff or on the protected class of which the plaintiff is a member." The district court did not credit the statistical evidence offered by Wright's expert which did not include all offerings of employment made by the united States Attorney's Office. Instead, the expert limited his study to those applicants who had submitted written applications for employment. Further, Wright's statistical case depends upon the underlying assumption that there was a fixed set-aside program of a specific number of recent graduates. The evidence did not compel the district court to find there was such a fixed division between the new hirees. Since the expert conceded that there would not be a statistically signi-

ficant difference if the categories did not exist, we cannot find that the district court erred in concluding that the disparate impact theory had not been proven.

With respect to the district court's finding that the defendants had articulated legitimate, non-discriminatory reasons for the failure to hire Wright, Wright makes a persuasive argument that at least some of the reasons enumerated were unsupported in the record. However, defendants are obliged to articulate only one legitimate, non-discriminatory reason for the failure to hire plaintiff, and we cannot find that all of the seven reasons listed by the court were pretextual.

The district court found that "[m]ost persons hired for the positions of Assistant United States Attorney by Mr. [Stanley] Marcus [who had recently

assumed the position of U.S. Attorney] were as a result of personal recommendations or personal knowledge by Mr. Marcus." The court then listed among the legitimate, non-discriminatory reasons articulated by defendants for the failure to hire Wright that "he was unknown to the United States Attorney (Marcus) from prior personal experience, or personal recommendations." Another reason was that plaintiff "was one of over 200 applicants competing for approximately 40 jobs at the office of United States Attorney, and his application failed to distinguish him as someone worthy of special consideration." Appellant has failed to persuade us that the district court erred in rejecting his contention that these reasons were pretextual.

Even if Wright had shown a violation, he did not prove his right to recovery. The district court concluded that

"[p]laintiff has failed to meet his burden of proof that 'but for' his age, he would have been hired by defendants." Wright argues that he has no obligation to prove that age was "a determining factor" in the decision not to hire him, see Maxfield v. Sinclair International, No. 84-1518 (3d Cir. July 3, 1985), slip op. at 4-5, because the statute applicable to non-discrimination on account of age in federal employment fails to use the "because of" language that appears in Title VII, 42 U.S.C. section 2000e-2(a)(1), and the Age Discrimination in Employment Act, 29 U.S.C. 633a [sic]. The federal statute, however, does provide that "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. section 633a(c) (emphasis added). Without showing

that age was a determinative factor vis-a-vis his employment, plaintiff has not shown that he was "aggrieved".

For the foregoing reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

VICTOR WRIGHT	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA et al.	:	NO. 83-0797

MEMORANDUM AND ORDER

KELLY, J. OCTOBER 1, 1984

This is an action alleging that the United States Attorney's Office for the Southern District of Florida intentionally discriminated against the plaintiff, Victor Wright, because of his age in violation of 29 U.S.C. section 621, et seq. Plaintiff is 62 years of age and was a former Assistant United States Attorney for the Eastern District of Pennsylvania having resigned that position in 1970.

In 1981, the plaintiff, then age 58, sent a letter with his resume to the United States Attorney for the Southern District of Florida requesting consider-

ation for employment. The then First Assistant United States Attorney responded to plaintiff's letter by suggesting that additional information was needed in order for plaintiff's application to be considered. The plaintiff supplied some additional information and was subsequently informed that an interview would take place in Febrruary, 1982. Just prior to the interview, the then First Assistant United States Attorney informed the plaintiff that the interview was postponed because a new United States Attorney was taking office and until he came on the scene, all hiring was was [sic] temporarily frozen.

When the new United States Attorney (Stanley Marcus) assumed office, he brought with him his top supervisory staff. Mr. Marcus was immediately faced with problems unique to the Southern District of Florida, i.e., the Cuban boat-

lift, the increase in illegal immigration from Haiti and the establishment of the special drug task force headed by the Vice President of the United States. Mr. Marcus, prior to this new appointment, was the United States Attorney in the Eastern District of Michigan in Detroit, Michigan. To staff the Florida office, Mr. Marcus relied heavily on persons he either knew personally as effective prosecutors and administrators or personal recommendations from other knowledgeable sources such as judges and leading members of the bar of South Florida. Applications for employment on file with the United States Attorney's Office prior to Mr. Marcus' and his supervisory staff's arrival were given scant, if any, personal review. Unfortunately, the plaintiff's application was within that group. The testimony revealed that Mr. Marcus made the final decision as to all

hiring at the United States Attorney's Office. He offered positions to a significant number of persons who were in the protected age group as well as younger persons.

The plaintiff offered testimony as to disparate treatment, however, the evidence is defective as it did not include all offerings of employment made by the United States Attorney's Office, but merely reviewed the results of those persons who submitted written applications for employment.

Accordingly, I have concluded the plaintiff has failed to meet the burden of proof that the reason he he was not employed as an Assistant United States Attorney was based on considerations of his age. Therefore, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is an action alleging

that the United States Attorney's Office for the Southern District of Florida (U.S. Attorney) intentionally discriminated against plaintiff because of his age in violation of 29 U.S.C. section 621 et seq.

2. On or about July 23, 1981, plaintiff, then 58 years of age, wrote to defendant United States Attorney for the Southern District of Florida expressing an interest in joining the United States Attorney's staff.

3. Defendant [sic] graduated from Yale University with a degree of Bachelor of Engineering (with high honors) in 1948. He graduated from Stetson University College of Law in March, 1951, with a degree of Juris Doctor (magna cum laude). He was the recipient of the Sterling Fellowship at the Yale Law School for the academic year 1951-52.

4. Plaintiff was admitted to

practice in Florida, Pennsylvania, and Vermont.

5. In plaintiff's letter of July 23, 1983 [sic], to the U.S. Attorney, he attached an admittedly incomplete Curriculum Vitae.

6. On September 15, 1981, the then First Assistant U.S. Attorney wrote the plaintiff requesting additional information regarding plaintiff's background.

7. Plaintiff responded on October 8, 1981, to the inquiry of the First Assistant U.S. Attorney by providing some of the additional information requested. Said additional information set forth plaintiff's age.

8. In December, 1981, the First Assistant U.S. Attorney contacted plaintiff and arranged for an interview on February 16, 1982.

9. On February 3, 1982, Stanley

Marcus, Esquire, was nominated to be the United States Attorney for the Southern District of Florida.

10. On or about February 16, 1982, Stanley Marcus, Esquire, placed a freeze on all hiring and interviewing of prospective applicants to allow Mr. Marcus to become familiar with the needs of the office.

11. Pursuant to Mr. Marcus' personnel freeze, a letter dated February 22, 1982 was sent to the plaintiff informing him that the interview was cancelled.

12. Plaintiff had previously served as an Assistant United States Attorney for the Eastern District of Pennsylvania from 1968 to 1970. During his tenure as an Assistant United States Attorney plaintiff was rated by his superiors to be fully qualified and professionally competent in all respects to

handle civil and criminal matters on behalf of the government.

13. In April, 1982, Mr. McDonald, First Assistant United States Attorney told the plaintiff that his application was still under active consideration.

14. In May, 1982, Mr. Jay Brant became Specical Assistant United States Attorney and took over the duties of reviewing and screening applicants for the position of Assistant United States Attorney.

15. At no time did Mr. Brant discuss with Mr. McDonald prior to McDonald's departure from the U.S. Attorney's Office, the plaintiff's employment application. During the period between the former U.S. Attorney's leaving and Mr. Marcus' early status as U.S. Attorney, numerous employment applications for Assistant United States Attorney were received.

16. On or about June 30, 1982, plaintiff inquired by letter as to the status of his application.

17. On or about August 20, 1982, Mr. Brant received a telephone call from plaintiff regarding plaintiff's application.

18. Mr. Brant advised the plaintiff that his application was still under review and that the U.S. Attorney's Office was negotiating with the Department of Justice for additional positions.

19. Mr. Marcus, United States Attorney, was not aware of, nor did he review plaintiff's application for employment prior to the time this action was filed.

20. During this transition period of the change of the United States Attorney in the Southern District of Florida, the workload was increased due to the following conditions:

(1) the formation of a special drug task force headed by Vice President George Bush;

(2) the boatlift of Cuban refugees to South Florida;

(3) the increase in illegal Haitian immigrants to South Florida.

21. As a result of the increased workload, neither the United States Attorney nor any of his supervisory officials reviewed the employment applications previously on file at the United States Attorney's Office prior to Stanley Marcus assuming the office of United States Attorney.

22. Neither Mr. Marcus, Mr. Brant, or Mr. McDonald were aware that the plaintiff was over 40 years of age until after the filing of this lawsuit.

23. Most persons hired for the positions of Assistant United States At-

torney by Mr. Marcus were as a result of personal recommendations or personal knowledge by Mr. Marcus.

24. Mr. Marcus made a considerable number of offers of employment as Assistant United States Attorney to persons within the protected age group.

25. There is no valid statitical evidence which shows that the hiring program of the United States Attorney's Office had an adverse impact on the plaintiff or on the protected class of which the plaintiff is a member.

26. The decision not to interview the plaintiff for a postion as an Assistant United States Attorney was based on a lack of recommendation of persons known to Mr. Marcus and/or an administrative mix-up where applications for employment on file prior to Mr. Marcus' assumption of office were not reviewed during the period vacant positions were filled by

Mr. Marcus.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion that defendants intentionally discriminated remains at all times with the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. Plaintiff has met his prima facie burden under Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980), that is, he has demonstrated:

(a) that he applied for and was minimally qualified for a position as an Assistant United States Attorney;

(b) that he was not offered such a position;

(c) that defendants continued to seek qualified applicants;

(d) that he was a member of the protected class.

3. Under Smithers v. Bailar, the

presence of a prima facie case imposes upon the employer the obligation to articulate a legitimate, non-discriminatory reason for failure to hire plaintiff.

4. Upon articulateion by the employer of a legitimate, non-discriminatory reason for failure to hire plaintiff, any inference of discrimination arising by reason of plaintiff's prima facie case "dissolves", and plaintiff has the burden of proving that the proffered reason is pretextual. Smithers v. Bailar.

5. Defendants have articulated legitimate, non-discriminatory reasons for failure to hire plaintiff, including:

(a) the timing of his application and interview precluded his hire under the previous United States Attorney (Wampler) before April, 1982;

(b) after April, 1982,

his application was, according to the records available to defendants, incomplete and inadequate;

(c) he was unknown to the United States Attorney (Marcus) from prior personal experience, or personal recommendations;

(d) he had no present connection with the Southern District of Florida or its courts or legal community;

(e) he had no specialized expertise in narcotics and dangerous drug prosecution;

(f) he had no previous work experience with the Judges and the courts in the Southern District of Florida;

(g) defendant [sic] was one of over 200 applicants competing for approximately 40 jobs at the office of United States Attorney, and his application failed to distinguish him as someone

worthy of special consideration.

6. Plaintiff has failed to produce evidence of disparate treatment.

7. In selecting persons for hire as Assistant United States Attorneys, defendants were not motivated by any discriminatory animus, nor was their failure to hire plaintiff the result of purposeful or intentional discrimination.

8. Plaintiff has failed to meet his burden of proof that "but for" his age, he would have been hired by defendants. Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1984). app. pending.

Therefore, the Court enters the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

VICTOR WRIGHT	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
UNITED STATES OF AMERICA et al.	:	NO. 83-0797

ORDER

AND NOW, this 1st day of October, 1984, for the reasons articulated in the foregoing Memorandum, it is ORDERED that judgment is entered on behalf of the Defendants United States of America, United States Department of Justice, William French Smith, individually and as Attorney General of the United States of America; Stanley Marcus, United States Attorney for the Southern District of Florida; and Jay Brant, First Assistant United States Attorney for the Southern District of Florida and against plaintiff,

Victor Wright.

BY THE COURT:

/s/JAMES McGIRR KELLY, J.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 84-1630

VICTOR WRIGHT, individually and on behalf of all others similarly situated,

Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM FRENCH SMITH, individually and as Attorney General of the United States of America; ATLEE W. WAMPLER, III, individually and as former U.S. Attorney for the Southern District of Florida; G. Brian McDONALD, individually and as former First Assistant U.S. Attorney for the Southern District of Florida; STANLEY MARCUS, U.S. Attorney for the Southern District of Florida; and JAY BRANT, First Assistant U.S. Attorney for the Southern District of Florida

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Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 83-0797)
District Judge: James McGirr Kelly

Before: SEITZ and SLOVITER, Circuit Judges, and COHEN, District Judge*

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* Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on July 18, 1985.

On consideration whereof, it is now hereby ordered and adjudged by this Court that the judgment of the District Court dated October 1, 1984 be, and the same is, hereby affirmed.

Costs taxed against appellant.

Attest:

/s/M. Elizabeth Ferguson
Chief Deputy Clerk

July 24, 1985

RECEIVED AND FILED
7-24-85
SALLY MRVOS
Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 84-1630

VICTOR WRIGHT, individually and on behalf of all others similarly sitated,

Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM FRENCH SMITH, individually and as Attorney General of the United States of America; ATLEE W. WAMPLER, III, individually and as former U.S. Attorney for the Southern District of Florida; G. Brian McDONALD, individually and as former First Assistant U.S. Attorney for the Southern District of Florida; STANLEY MARCUS, U.S. Attorney for the Southern District of Florida; and JAY BRANT, First Assistant U.S. Attorney for the Southern District of Florida

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON AND MANSMANN, Circuit Judges and COHEN, District Judge*

The petition for rehearing filed by

* Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

Appellant, VICTOR WRIGHT

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for a rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/Dolores K. Sloviter
Judge

Dated: August 13, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

VICTOR WRIGHT	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 83-0797
UNITED STATES OF AMERICA, et al.	:	

DEFENDANTS' PROPOSED CONCLUSIONS
OF LAW

1. The ultimate burden of persuasion that defendants intentionally discriminated here remains at all times with the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. Plaintiff has met his prima facie burden under Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980), that is, he has demonstrated:

a) that he applied for and was minimally qualified for a position as an Assistant United States Attorney.

b) that he was not offer-

ed such a position.

c) that defendants continued to seek qualified applicants.

d) that he was a member of the protected class.

3. Under Smithers v. Bailar, the presence of a prima facie [sic] imposes upon the employer the obligation to articulate a legitimate, non-discriminatory reason for failure to hire plaintiff.

4. Upon articulation by the employer of a legitimate, non-discriminatory reason for failure to hire plaintiff, any inference of discrimination arising by reason of plaintiff's prima facie case "dissolves", and plaintiff has the burden of proving that the proffered reason is pretextual. Smithers v. Bailar.

5. Defendants have articulated legitimate, non-discriminatory reasons for failure to hire plaintiff, including:

a) the timing of his application and interview precluded his hire under the Wampler regime, that is, before April 1982.

b) after April 1982, his application was, according to the records available to defendants, incomplete and inadequate.

c) his experience in the field of criminal law was not current.

d) he was unknown to the United States Attorney from prior personal experience, or personal recommendations.

e) he had no present connection with the Southern District of Florida or its courts or legal community.

f) he had no specialized expertise in narcotics and dangerous drug prosecution.

g) he had no previous work experience with the Judges and the courts in the Southern District of Florida.

h) defendant [sic] was one of over 200 applicants competing for approximately 40 jobs at the office of United States Attorney, and his application failed to distinguish him as someone worthy of special consideration.

6. Plaintiff in a disparate treatment case has the burden of proof not only on "the existence of disparate treatment but also that such treatment was caused by purposeful or intentional discrimination." Smithers v. Bailar, at 898.

7. A policy of extending favorable treatment to a group consisting predominantly of younger lawyers even if

plaintiff had shown its existence "is irrelevant to a claim of disparate treatment so long as the personnel action was not motivated by any discriminatory animus." Massarsky v. General Motors, Inc., 706 F.2d 111 (3d Cir. 1983).

8. In selecting persons for hire as Assistant United States Attorneys, defendants and each of them , were not motivated by any discriminatory animus, nor was their failure to hire plaintiff the result of purposeful or intentional discrimination.

9. Plaintiff has failed to meet his burden of proving that "but for" his age, he would have been hired by defendants. Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1984).

10. The United States Court of Appeals for the Third Circuit has expressly declined to rule on the question of whether the concept of "disparate im-

pact" is applicable in the context of the Age Discrimination in Employment Act, and has suggested that sound policy reasons exist for not applying it. Massarsky v. General Motors, Inc., 706 F.2d 111 (3d Cir. 1983), citing "Age Discrimination and Disparate Imapct Doctrine" 34 Stanford Law Review 837 (1982).

11. Even if a disparate impact analysis were applicable, plaintiff has failed to meet his burden under that analysis here. In disparate impact, plaintiff must show a disproportionate impact on the protected class. "An adverse impact on an employee, or even a few employees, is not sufficient to establish disparate impact." Massarsky v. General Motors, Inc. at 121. See, Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 194 (3d Cir. 1979).

Respectfully submitted,

EDWARD S.G.DENNIS, JR.
United Sates Attorney

/s/ALEXANDER EWING,JR.
Assistant United States
Attorney, Chief, Civil
Division

/s/JAMES G. SHEEHAN
Assistant United States
Attorney